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Nos. 07-1090 and 08-539

In the Supreme Court of the United States

REPUBLIC OF IRAQ, *PETITIONER*,

v.

JORDAN BEATY, ET AL., *RESPONDENTS*.

REPUBLIC OF IRAQ, *PETITIONER*,

v.

ROBERT SIMON, ET AL., *RESPONDENTS*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR *AMICI CURIAE* JAMES S. VINE, *ET AL.* IN SUPPORT OF RESPONDENTS IN 08-539

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

PROCEDURAL HISTORY OF THE *VINE* CASE 3

SUMMARY OF THE ARGUMENT 6

ARGUMENT 10

I. Any Authority The EWSAA May Have Bestowed Upon The President To Exempt Iraq From Section 1605(a)(7) Of the FSIA Expired On September 30, 2005. 12

A. Congress Clearly Intended That All Of The Authorities Contained In Section 1503 Of The EEWSA, Including Any Authority To Exempt Iraq From The Jurisdictional Grant Contained In Section 1605(a)(7) Of the FSIA, Would Lapse Upon The Date Specified In The Sunset Provision. 12

B. Even If Congressional Intent Regarding Application Of The Sunset Provision Were Unclear, That Provision Must Be Construed As Applying To The Authorities

Page

Contained In Section 1503 In Order To Avoid Grave Constitutional Questions In Regard To The Separation Of Powers..... 24

II. Absent An Unmistakably Clear Statement Of Congressional Intent – Of Which There Is None – Section 1503 Of The EWSAA Cannot Be Construed As Impliedly Amending Section 1605(a)(7) Of The FSIA. 28

CONCLUSION..... 33

APPENDIX

List of *Amici*..... 1a

Page

TABLE OF AUTHORITIES

CASES

Acree v. Republic of Iraq,
370 F.3d 41 (D.C. Cir. 2004) ..... *passim*

Atchison, T. & S. F. R. Co. v. United States,
295 U.S. 193 (1935) 20

Breuer v. Jim's Concrete of Brevard, Inc.,
538 U.S. 691 (2003) 22

Calcano-Martinez v. INS, 232 F.3d 328
(2d Cir. 2000) 31-32

Chapman v. Houston Rights Welfare Organization,
441 U.S. 600 (1979) 11

Clinton v. New York,
524 U.S. 417 (1998) 9, 24

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,
485 U.S. 568 (1988) 27

Electronic Data System Corp. v. Social Security Organization of Iran,
508 F. Supp. 1350 (N.D. Tex. 1981),
affirmed in part and vacated in part,
651 F.2d 1007 (5th Cir. 1981) 27

Page

Glidden Co. v. Zdanok,
370 U.S. 530 (1962) 27

Griffin v. Oceanic Contractors,
458 U.S. 564 (1982) 20

Helvering v. Stockholms Enkilda Bank,
293 U.S. 84 (1934) 22

Hill, et al. v. Republic of Iraq,
No. 99-3346 (D.D.C.) 3

Hill v. Republic of Iraq,
175 F. Supp. 2d 36 (D.D.C. 2001),
reversed in part, 328 F.3d 680 (D.C.
Cir. 2003) 3

Holloway v. United States,
526 U.S. 1 (1999) 11

INS v. Chadha,
462 U.S. 919 (1983) 24

INS v. St. Cyr,
533 U.S. 289 (2002) 31

J.W. Hampton, Jr., & Company v.
United States,
276 U.S. 394 (1928) 25

Lockerty v. Phillips,
319 U.S. 182 (1943) 27

Page

Manhattan General Equipment Company v. Commissioner, 297 U.S. 129 (1936) 17

North Haven Board of Education v. Bell, 456 U.S. 512 (1982) 23

National Association of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) 29, 30

Palmore v. United States, 411 U.S. 389 (1973) 27

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 30, 32

Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999)..... 32

Seyam, et al. v. Republic of Iraq, No. 03-888 (D.D.C.) 2, 4, 5

Simon, et al. v. Republic of Iraq, No. 03-691 (D.D.C.) 2, 4, 5

Sorenson v. Secretary of Treasury, 475 U.S. 851 (1986) 22

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 29

Terran v. Secretary of Health and Human Services, 195 F.3d 1302 (Fed. Cir. 1999) 24

Page

Times Publishing Co. v. U.S. Department of Commerce,
236 F.3d 1286 (11th Cir. 2001) 18

Traynor v. Turnage,
485 U.S. 535 (1988) 30

Tyler v. Cain,
533 U.S. 656 (2001) 11

United States v. Borden Co.,
308 U.S. 188 (1939) 29, 30

United States v. Hansen,
772 F.2d 940 (D.C. Cir. 1985) 30

United States v. Jin Fuey Moy,
241 U.S. 394 (1916) 27

United States v. Lahey Clinic Hospital, Inc.,
399 F.3d 1 (1st Cir. 2005)..... 24

United States v. Larionoff,
431 U.S. 864 (1977) 17

United States v. Mechanic,
809 F.2d 1111 (5th Cir. 1987) 18

United States v. Quinn,
401 F. Supp. 2d 80 (D.D.C. 2005)..... 16-17, 19

United States v. Spawr Optical Research, Incorporated,
685 F.2d 1076 (10th Cir. 1982) 18

Page

United States v. Welden,
377 U.S. 95 (1964) 30

Vine, et al., v. Republic of Iraq,
No. 01-2674 (D.D.C.) 1-5

Vine v. Republic of Iraq,
459 F. Supp. 2d 10 (D.D.C. 2006) 5

Vine v. Republic of Iraq, 2006 U.S. App.
LEXIS 30400 (D.C. Cir. Dec. 11, 2006) 5

Watt v. Alaska,
451 U.S. 259 (1981) 30

Whitman v. American Trucking Ass'ns,
531 U.S. 457 (2001) 25

Wisconsin Project on Nuclear Arms Control v. U.S. Department of Commerce,
317 F.3d 275 (D.C. Cir. 2003) 18

STATUTES AND REGULATIONS

Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan,
Pub. L. No. 108-106, 117 Stat. 1230..... *passim*

Emergency Wartime Supplemental Appropriations Act,
Pub. L. No. 108-011, 117 Stat. 559..... *passim*

Page

Export Administration Act,
50 U.S.C. App. § 2401-20 17

Foreign Assistance Act of 1961,
22 U.S.C. § 2151, *et seq.* ..... *passim*
22 U.S.C. § 2371(c) 9, 14

Foreign Sovereign Immunities Act ,
28 U.S.C. §§ 1602 *et seq.*..... 3
28 U.S.C. § 1605(a)(7) .....*passim*
28 U.S.C. § 1608(e). 3

International Emergency Economic
Powers Act,
50 U.S.C. §§ 1701 & 1702 ..... 18, 19

Iraq Sanctions Act of 1990,
Pub. L. No. 101-513, 104 Stat.
1979, 2047..... 23

National Defense Authorization Act
of 2008,
Pub. L. No. 110-181, 122 Stat 3..... 5, 6

49 Fed. Reg. 13099 (1984) 18

66 Fed. Reg. 44025 (2001) 18

68 Fed. Reg. 26,459 (2003) 4, 15, 19

Page

MISCELLANEOUS

H.R. Conf. Rep. No. 337, 108th Cong., 1st Sess. 59 (2003) 22

S. Rep. No. 108-33, 108th Cong., 1st Sess. 21 (2003) 11

Webster's New Twentieth Century Dictionary (2nd ed. 1966) 23

Weekly Comp. Pres. Doc. 647 (2003) 25

INTEREST OF THE *AMICI CURIAE*

Amici curiae, James S. Vine, *et al.*,[1] are 201 American citizens who are plaintiffs in *Vine v. Republic of Iraq* No. 01-02674 (D.D.C.), a suit that was originally filed on December 27, 2001, as a class action against the Republic of Iraq ("Iraq") for money damages resulting from acts of hostage taking and false imprisonment.[2] The *Vine* plaintiffs were held in Iraq and Kuwait following the Iraqi invasion on August 2, 1990, when former Iraqi President Saddam Hussein issued an order detaining all American citizens present in those countries in order to extract a commitment from the United States and its coalition allies to refrain from using military force to liberate Kuwait.

Many of the *Vine* plaintiffs were rounded up by Iraqi security forces and forcibly relocated to strategic sites, where they were used as "human shields" to prevent allied air attack. Other *Vine* plaintiffs fled to various diplomatic properties in Iraq and/or Kuwait, where they were confined throughout the crisis. Still others hid themselves in "safehouses" and private residences for fear of being captured by Iraqi security forces, who they believed would either execute them or force them to serve as "human shields." All of the *Vine* plaintiffs endured harsh conditions throughout their detention, lived in constant fear for their lives and suffered severe emotional distress. Many witnessed unimaginable atrocities. Others were beaten, raped, tortured and/or subjected to mock executions.

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[1] A complete list of the *Vine* plaintiff *amici* is set forth in Appendix A.

[2] The parties have consented to the filing of this brief.

The interest of the *Vine* plaintiffs in the resolution of these matters could not be greater. Indeed, upon motion of the *Vine* plaintiffs, the district court consolidated their case with both *Seyam v. Republic of Iraq*, No. 03-00888 (the plaintiffs in which are members of the putative class in *Vine*) and *Simon v. Republic of Iraq,* 03-00691, for purposes of resolving Iraq's motion to dismiss. The district court then issued a single consolidated decision in which it granted Iraq's motion in the *Seyam* and *Simon* cases, but denied it in the *Vine* case. In other words, the district court decision that the D.C. Circuit affirmed and that is a subject of the present *writs of certiorari* is as much a decision in the *Vine* case as it is in two of the three cases that are covered by those *writs*. However, because the *Vine* plaintiffs had the "misfortune" to have prevailed in the district court—and because Iraq made a tactical decision to forego its appellate rights—the *Vine* plaintiffs have been denied the opportunity to appear before this Court as parties and to argue their cause.

The *Vine* plaintiffs' inability to participate in this proceeding is particularly distressing because the arguments that they believe are the most compelling are not highlighted in Respondents' brief, and have received little or no attention from either Iraq or the United States. Given these unusual circumstances, the *Vine* plaintiffs respectfully request that this Court give their brief *amici curiae* the same degree of consideration that it would if they were appearing as parties before it.

PROCEDURAL HISTORY OF THE *VINE* CASE

The *Vine* plaintiffs filed their original complaint against Iraq on December 27, 2001, invoking the district court's jurisdiction under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (the "FSIA"), which permits American citizens to bring actions against terrorist states for certain acts of terrorism, including hostage-taking. 28 U.S.C. § 1605(a)(7).[3] In accordance with the requirements of the FSIA, 28 U.S.C. § 1608(e), the *Vine* plaintiffs effectuated service of their complaint upon Iraq on November 25, 2002.

Following the entry of an order of default against Iraq on August 18, 2003, the United States filed a statement of interest in the *Vine* case, arguing that jurisdiction over Iraq had not existed since May 7, 2003, when the President issued a determination, declaring that all "provision[s] of law that appl[y] to countries that have supported terrorism" were inapplicable with respect to Iraq. Presidential

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[3] *Vine* was filed as a case related to *Hill v. Republic of Iraq*, Case No. 99-3346 (D.D.C.), an action that had been filed two years before and that was prosecuted on behalf of 180 other plaintiffs who had been victims of Iraq's hostage-taking in the wake of its invasion of Kuwait. In that action, the district court ruled that each of the plaintiffs had established his or her claim to relief by satisfactory evidence and issued them default judgments that totaled approximately $94 million. *See Hill v. Republic of Iraq*, 175 F. Supp. 2d 36 (D.D.C. 2001), *rev'd in part on other grounds*, 328 F.3d 680 (D.C. Cir. 2003). These judgments were collected in full in March 2003, when President George W. Bush instructed the Secretary of Treasury to issue a license instructing the Bank of New York to pay the judgment out of blocked Iraqi accounts.

Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003). In issuing this determination, the United State argued, the President was acting pursuant to authorities delegated to him under the second proviso of Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 (the "EWSAA"), which provides that:

> the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism.

Pub. L. No. 108-011, § 1503, 117 Stat. 559.

While the issue was still being pending in the district court, the D.C. Circuit held in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), that Section 1503 of the EEWSA was not intended to give the President the authority to exempt Iraq from the exception to immunity set forth in Section 1605(a)(7) of the FSIA. In an order, dated July 20, 2004, the district court ruled that the *Acree* decision foreclosed the United States' jurisdictional argument.

Subsequently, in January 2005, Iraq appeared in the *Vine* case, which the district court then consolidated with the *Seyam* and *Simon* cases for purposes of resolving Iraq's motion to dismiss. That motion sought dismissal on a variety of grounds, including that plaintiffs' claims were all barred by the statute of limitations, that they had failed to state a viable cause of action, that their claims presented a non-justiciable political question, and

that the President's exercise of his supposed authority under Section 1503 of the EWSAA had divested the court of jurisdiction over Iraq.

On September 7, 2006, the district court issued its decision on Iraq's motion to dismiss, in which it denied that motion as to the claims of the *Vine* plaintiffs, but granted it as to the claims of the *Seyam* and *Simon* plaintiffs on statute of limitations grounds. *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10 (D.D.C. 2006). Although Iraq filed a notice of appeal from the order denying its motion to dismiss the *Vine* case, Iraq ultimately moved to dismiss that appeal and the D.C. Circuit obliged. *Vine v. Republic of Iraq*, 2006 U.S. App. LEXIS 30400 (D.C. Cir. Dec. 11, 2006).

While Iraq was filing its appeal in the *Vine* case, the *Seyam* and *Simon* plaintiffs filed a notice of appeal of the decision dismissing their claims. In an opinion issued on June 24, 2008, the Court of Appeal reversed the district court's ruling that the *Seyam* and *Simon* cases were time-barred, rejected Iraq's argument that a Presidential waiver under Section 1083(d) of the National Defense Authorization Act of 2008, Pub. L. No. 110-181, 122 Stat. 3 (the "NDAA"), stripped the district courts of jurisdiction to hear pending claims against Iraq under Section 1605(a)(7) of the FSIA, and adhered to the *Acree* court's ruling that Section 1503 of the EWSAA also did not give the President the authority to deprive the courts of jurisdiction over such claims. *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008).

On January 9, 2009, this Court granted Iraq's petition for *certiorari* to address the issues whether jurisdiction continues to exist over Iraq in light of the exercise of Presidential authorities under Section 1083(d) of the NDAA and Section 1503 of the EWSAA.[4]

SUMMARY OF THE ARGUMENT

In their opinions in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), both Judge Edwards, writing for the majority, and Chief Justice Roberts, in a concurring opinion, found the meaning of Section 1503 of the EEWSA to be less than pellucid and the question whether that section's second proviso gave the President the authority to exempt Iraq from the jurisdictional grant contained in Section 1605(a)(7) of the FSIA to be a close one. *Id.* at 51 and 62. This Court, however, need not struggle trying to answer that question.

The legal landscape surrounding the jurisdictional issue in this case has dramatically changed since the D.C. Circuit issued its decision in the *Acree* case on June 4, 2004. At that time, the authorities contained in Section 1503 were in full force and effect. However, Section 1503 contains its own sunset provision, which, by its terms, provides that "the authorities contained in this section" (including the authority to declare "provision[s] of

[4] This brief does not address the issue whether Section 1083(d) of the NDAA deprives the district courts of jurisdiction over Iraq. For the reasons set forth in Respondents' merits brief and the United States' *amicus* brief, the *Vine* plaintiffs agree that it does not have that effect.

law that appl[y] to countries that have supported terrorism" inapplicable to Iraq) "shall *expire* on September 30, 2004" unless extended by a subsequent congressional enactment. Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (emphasis added). While Congress temporarily extended the sunset date by one year in November 2003, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230, it has granted no further extension and, hence, the authorities contained in Section 1503 lapsed on September 30, 2005.

While the *Acree* panel disagreed on the issue whether Section 1503 authorized the President to limit the jurisdictional grant contained in Section 1605(a)(7) of the FSIA, all three of the *Acree* judges agreed on what would happen upon the expiration of Section 1503's sunset period—that is, they agreed that jurisdiction over Iraq would be restored upon the triggering of its sunset provision. 370 F.3d at 57 and 62. As that provision became effective some three and one half years ago, Section 1605(a)(7) has applied to Iraq ever since.

The United States' argues that this passing of the sunset is of no moment because the President's exercise of his authority to exempt Iraq from laws applicable to terrorist countries has "a *permanent* effect." (United States *Amicus* Brief at 19 (emphasis in original.) It is wrong. First, the proposition that delegated authorities can somehow outlast the statute that is the source of such delegation is totally devoid of support and conflicts with elementary principles of administrative law.

Second, the United States' view regarding the temporal scope of Section 1503's second proviso cannot be squared with its admission that the authorities contained in that section's fourth and fifth provisos, which likewise, make certain provisions of law inapplicable to Iraq, expired with the passing of the sunset on September 30, 2005. As there is no relevant distinction between the language of these two provisos and the language of the second proviso, the United States' interpretation runs afoul of the basic canon of construction that requires identical words used in the same statute to be given the same meaning.

The failure to apply that rule in this case carries dangerous and absurd policy consequences that Congress could not possibly have intended. Under the United States' interpretation of Section 1503, the President permanently exempted Iraq from any and all provisions of law applicable to terrorist states. Furthermore, since all of the authorities that Section 1503 granted the President expired on September 30, 2005, he no longer has any implied power to undo Iraq's exemption from those provisions. Thus, in the unfortunate event that insurgent forces were to take power in Iraq and launch terrorist attacks against U.S. interests around the world, the President would be powerless to take immediate action. Rather, he would have to wait for Congress to pass a new statute making applicable to Iraq all of the provisions of law that President Bush supposedly made permanently inapplicable to that country some six years ago.

If, as would be the case under the United States' interpretation of Section 1503, the only way to re-apply all of these provisions of law to Iraq would be for Congress to enact new legislation withdrawing Iraq's exemption, then the power the Congress delegated to the President in that section was, in effect, the power to amend the law. There is, however, "no provision in the Constitution that authorizes the President to . . . amend . . . statutes." *Clinton v. New York*, 524 U.S. 417, 438 (1998). Where, as here, a proffered interpretation of a statutory provision would present a serious separation of powers problem, that interpretation should be avoided if there is any other plausible way of construing that provision.

A construction of Section 1503's second proviso under which the Presidential authorities contained in that proviso would lapse on its sunset date is more than just plausible. That provision was an emergency measure, the manifest purpose of which was to enable the President to remove the barriers to aiding and trading with Iraq that had been imposed as a result of its designation as a terrorist state. Such authority was needed only until such time as conditions on the ground in Iraq would allow the Secretary of State to certify that its new leadership had provided credible assurances that Iraq would henceforth abide by the rule of law, thereby, enabling him to rescind Iraq's designation as a state-sponsor of terrorism. 22 U.S.C. § 2371(c). Thus, Section 1503 of the EEWSA is best construed as an *interim measure*, which gave the President the authorities he needed to exempt Iraq from provisions of law applicable to countries that have supported

terrorism for the limited period of time specified in its sunset provision.

Even assuming that jurisdiction over Iraq was not restored when the authorities contained in Section 1503 expired, the argument that Section 1503 authorized the President to make Section 1605(a)(7) of the FSIA inapplicable to Iraq overlooks the cardinal rule of statutory construction that disfavors implied amendments and repeals. Consistent with this rule, which is not mentioned in either of the opinions in *Acree*, this Court has repeatedly held that a legislative intention to repeal or amend a prior statute will be found only where such intention is "clear and manifest." As Chief Justice Roberts acknowledged in his concurring opinion in *Acree*, Section 1503's second proviso does not constitute an unequivocal congressional command to limit jurisdiction under Section 1605(a)(7) of the FSIA. 370 F.3d at 62. Accordingly, it cannot be construed as having that effect.

ARGUMENT

In their haste to be rid of these cases, Iraq and the United States seek to manipulate the meaning of nineteen words in a proviso to a wartime appropriations bill, which was enacted by Congress on an emergency basis and without debate. To this end, they construe those words as impliedly amending the FSIA, so as to give Iraq a *permanent* exemption from its jurisdictional grant in cases involving acts of state-sponsored terrorism. It is, however, the task of this Court to interpret the words of the EWSAA not as if they existed "in a

vacuum," but rather in the "context" of that statute as a whole, *Tyler v. Cain*, 533 U.S. 656, 662 (2001), and "in light of the purposes, Congress sought to serve." *Chapman v. Houston Rights Welfare Org.*, 441 U.S. 600, 608 (1979); *see also Holloway v. United States*, 526 U.S. 1, 6 (1999) (stating that basic principle of construction mandates that courts "'consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme'").

The EWSAA was enacted on April 16, 2003 in the immediate aftermath of the fall of Baghdad to coalition forces. Pub. L. No. 108-011, 117 Stat. 559. The manifest purpose of that statute was to meet Iraq's urgent need for foreign assistance and to enable private relief organizations and businesses to help in the rebuilding effort. These objectives could not be achieved, however, without removing the barriers to aid and commerce that had been imposed on Iraq by virtue of the former regime's support for international terrorism. As set forth in greater detail in Respondents' brief, the removal of these barriers—and not any desire to forever deprive American victims of Iraqi terrorism of their right to a judicial forum—was the sole concern of the language in Section 1503 of the EWSAA authorizing the President to exempt Iraq from "Section 620A of the Foreign Assistance Act or any other provision of law" applicable to terrorist states. *See* S. Rep. No. 108-33, at 21 (2003) (noting that section 1503 responded to the President's "request for the repeal of the Iraqi Sanctions Act of 1990 [sic], and *other limitations on assistance for Iraq*") (emphasis added).

I. Any Authority The EWSAA May Have Bestowed Upon The President To Exempt Iraq From Section 1605(a)(7) Of The FSIA Expired On September 30, 2005.

In addressing whether the district courts have jurisdiction to entertain these actions, both Iraq and the United States devote almost their entire argument to the proposition that Section 1503 of the EEWSA was intended to give the President the authority to make Section 1605(a)(7) of the FSIA "inapplicable to Iraq." This Court, however, need not—and should not—address this question of statutory interpretation because any authority the EEWSA may have given the President to immunize Iraq from the jurisdiction of U.S. courts lapsed on September 30, 2005.

A. Congress Clearly Intended That All Of The Authorities Contained In Section 1503 Of The EEWSA, Including Any Authority To Exempt Iraq From The Jurisdictional Grant Contained In Section 1605(a)(7) Of The FSIA, Would Lapse Upon The Date Specified In The Sunset Provision.

Section 1503 of the EWSAA contains a sunset provision, which expressly states that "the authorities contained in this section" (including, of course, the authority to declare "provision[s] of law that appl[y] to countries that have supported terrorism" inapplicable to Iraq):

> shall *expire* on September 30, 2004, or on the date of enactment of a subsequent Act

> authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (emphasis added).

On November 6, 2003, Congress amended Section 1503 of the EWSAA to extend the authorities in that provision for an additional year. *See* Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230 (the "ESAADRIA"). However, at no time since that amendment has Congress enacted any additional amendment extending the authorities in Section 1503 of the EWSAA beyond September 30, 2005. Thus, even if the President had the authority to make Section 1605(a)(7) of the FSIA inapplicable to Iraq when Congress enacted the EWSAA in April 2003, that authority expired on September 30, 2005 and, hence, Section 1605(a)(7) has been applicable to Iraq ever since. *See Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004) (noting that expiration of Section 1503's sunset provision would operate to make Section 1605(a)(7) of the FSIA "available as a basis of jurisdiction" against Iraq in any action "based on events that occurred while Iraq was designated as a state sponsor of terrorism").

The temporal limits that the EWSAA imposed on the authorities contained in Section 1503 reflect the temporary nature of the problem those authorities were addressing. As set forth above, the problem

was that Iraq's designation as a state sponsor of terrorism had triggered various provisions of law that would prevent assistance to and restrict trade with that country. It was temporary because the Secretary of State had the authority to rescind that designation upon his certification that the new leaders of Iraq, whoever they might be and whenever they came to power, had provided credible assurances that Iraq would henceforth abide by the rule of law. 22 U.S.C. § 2371(c). But, as the uncertain conditions then prevailing in Iraq would make it impossible for the Secretary to make that certification for some time, Congress had to adopt *an interim measure* to prevent Iraq's designation as a terrorist state from blocking the effort to rebuild that country. *See Acree*, 370 F.3d at 62 (Roberts, C.J., concurring) ("One need look no further than the title of the EWSAA to discern its emergency nature."). That interim measure was Section 1503 of the EWSAA, which gave the President the authorities he needed to exempt Iraq from provisions of law applicable to countries that have supported terrorist states *for a period of 18 months*—by which time, Congress reckoned, conditions on the ground would be such as to permit the Secretary of State to remove Iraq from the terrorism list.

As history would have it, the Secretary rescinded Iraq's designation as a terrorist state in October 2004—eleven months before the expiration of Section 1503's sunset date (as extended by the ESAADRIA). As the Secretary's act rendered superfluous the President's May 2003 order exempting Iraq from the various provisions of law that restrict aid to and commerce with terrorist

countries, Congress was able to allow the sunset date to come and go without any consequence insofar as those provisions were concerned. Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003). That, however, was not at all the case with regard to Section 1605(a)(7) of the FSIA. Unlike statutory provisions that address aid and trade with terrorist countries, jurisdiction under Section 1605(a)(7) depends not on a foreign state's current designation as a sponsor of terrorism, but on its designation at the time of the terrorist act upon which a plaintiff's claim is based. 28 U.S.C. § 1605(a)(7)(A). Thus, to the extent that Section 1503 ever applied to Section 1605(a)(7), the lapse of presidential authority to make that provision inapplicable to Iraq resulted in the restoration of jurisdiction over that country.

That the sunset provision would have that effect is something about which *all three judges* on the *Acree* panel agreed. For instance, in his majority opinion, Judge Edwards stated that, if the United States' position were correct, jurisdiction over Iraq would "again be available" if and when the period specified in Section 1503's sunset provision elapsed—a result he characterized as "bizarre." 370 F.3d at 57.

Likewise, in his concurring opinion, Chief Justice Roberts wrote that Section 1605(a)(7) of the FSIA, as well as all other provisions of law that the President had made "inapplicable as to Iraq," would "return to full strength" upon expiration of the sunset provision. *Id.* at 62. Unlike the majority, however, Chief Justice Roberts found nothing

bizarre about this result because he viewed the sunset provision as an attempt "to buy [Congress] time for fuller consideration of the issues" and he thought it unlikely that "the majority's prediction of abject congressional lassitude" would turn out to be "accurate." *Id.*

In fact, history has demonstrated that Congress acted responsibly in extending the sunset provision by one year in November 2003—a period that proved more than sufficient in giving the Secretary of State the time he would need to remove Iraq from the terrorism list. However, once the Secretary had taken that action, Congress had no further need to extend the authorities contained in Section 1503. This inaction caused the sun to set on all such authorities on September 30, 2005.

In their briefs in this Court, both the United States and Iraq argue that this passing of the sunset is of no moment because the President's exercise of his authority to make provisions of law that apply to countries that have supported terrorism inapplicable to Iraq has "a *permanent* effect." (United States *Amicus* Brief at 19 (emphasis in original); *see also* Petitioners' Brief at 33.) Intrinsic to this interpretation of the EWSAA is the unstated, but necessary, proposition that authorities that have been delegated to the Executive Branch by Congress can somehow outlast the statute that is the source of such delegation.

Neither the United States nor Iraq cites a single case in support of this dubious proposition for the reason that no such case exists. *See United States v.*

Quinn, 401 F. Supp. 2d 80, 93 n.10 (D.D.C. 2005) (noting that "the Court could not locate a pertinent case outside the realm of trade embargos" under the Export Administration Act in which "the statute underlying the regulations lapsed and the regulations nonetheless continued in force"). In fact, the governing principle is just the opposite. Absent some intervening circumstance—not present here—"a statutory lapse . . . leave[s] the implementing regulations without a legislative foundation on which to stand," *id.* at 93, for, as this Court has repeatedly affirmed, a regulation that "operates to create a rule out of harmony with the statute" under which it was promulgated "is a mere nullity." *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936); *see also United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("regulations, in order to be valid[,] must be consistent with the statute under which they are promulgated").

Research has revealed just a single line of cases in which the courts have been called upon to address the effect of the expiration of statutory authority on regulations promulgated pursuant to that authority. All of these cases have arisen in the context of congressional failure to extend the sunset provision in the Export Administration Act, 50 U.S.C. app. § 2401-20 (the "EAA"), and they demonstrate that the novel view of delegated executive power that the United States is advancing here is incorrect.

Like the EWSAA, the EAA—which authorizes the President to regulate the export of goods in furtherance of U.S. national security, foreign policy and economic interests—contains a provision

terminating "[t]he authority granted by this Act" on a specified date. 50 U.S.C. app. § 2419. Since the passage of the EAA in 1979, Congress has permitted this authority to lapse on no less than six occasions. *Wisconsin Project on Nuclear Arms Control v. U.S. Dep't of Commerce,* 317 F.3d 275, 278 (D.C. Cir. 2003). And, on each such occasion, the President responded by declaring a national emergency and invoking his alleged authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 and 1702 ("IEEPA"), to rescue the regulatory regime that had been established under the EAA. *Wisconsin Project*, 317 F.3d at 278.

Implicitly acknowledging that the effect of the expiration of that statute would be to render all regulations promulgated thereunder a nullity, each of these executive orders has provided that "[a]ll rules and regulations issued . . . under the authority of the [EAA], as amended, . . . shall . . . remain in full force and effect as if issued or taken pursuant to" the President's authority under IEEPA. 49 Fed. Reg. 13099 (Executive Order 12470 of Mar. 30, 1984); *see also* 66 Fed. Reg. 44025 (Executive Order No. 13222 of Aug. 17, 2001). Furthermore, in each of the cases involving post-sunset date challenges to these rules and regulations, the courts have held that the issue of their validity turned "solely upon the President's exercise of his powers under IEEPA." *United States v. Mechanic,* 809 F.2d 1111, 1113 (5th Cir. 1987); *see also Times Publishing Co. v. U.S. Dep't of Commerce*, 236 F.3d 1286, 1291 (11th Cir. 2001); *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1078 (10th Cir. 1982) (stating that, in view of expiration of the statutory predecessor to the

EAA, the "sole basis" for regulations restricting export of goods to the former Soviet Union was an executive order purporting to extend them under the Trading With The Enemy Act); *Quinn*, 401 F. Supp. 2d at 93. To put it another way, had the President not rescued them by invoking his authority under IEEPA, all of the rules and regulations that had earlier been issued pursuant to the EAA would have lapsed when that statute's sunset provision took effect.

The implications of a construction of the EWSAA that would depart from the bedrock principle that delegated authorities expire with the statute that is their source are both dangerous and absurd. In the same determination in which he purportedly placed Iraq beyond the reach of Section 1605(a)(7) of the FSIA, President Bush also declared Section 620A of the Foreign Assistance Act and all other provisions of law restricting aid to and trade with state-sponsors of terrorism "inapplicable with respect to Iraq." 68 Fed. Reg. 26,459. If the United States' interpretation of the EWSAA is correct, Iraq's exemption from every one of these provisions is permanent and, since all of the authorities that Section 1503 granted the President have expired, that exemption can no longer be undone through executive action. In other words, as the United States would have it, Iraq enjoys a privileged status among the countries of the world: it is the only one that can sponsor acts of international terrorism without triggering the various provisions of U.S. law that authorize or compel the President to protect our country from such conduct.

The notion that Congress intended to enable the President to exempt Iraq from these provisions *in perpetuity* when it enacted the EWSAA in April 2003 is farfetched. At that point in time, the Ba'athist regime in Iraq had not yet surrendered and there was no guarantee that the regime that would ultimately replace it would not itself degenerate into a state sponsor of terrorism. Indeed, with American combat forces due to withdraw from Iraq within the next 18 months, the possibility remains that Iraq could eventually fall in the hands of insurgent forces that support international terrorism.

Yet, under the short-sighted interpretation of Section 1503 that the United States is promoting here, in the unfortunate event that such forces were to take power in Iraq and, upon having done so, to launch a concerted terrorist campaign against U.S. interests around the world, the President would be powerless to take immediate action. Rather, he would be required to wait for Congress to pass a new statute making applicable to Iraq all of the provisions of law that President Bush supposedly made permanently inapplicable to that country some six years ago. Given the availability of an alternative and more plausible reading of Section 1503, this Court should not construe that provision in a manner that would produce such an absurd and obviously unintended result. *See, e.g., Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *Atchison, T. & S. F. R. Co. v. United States*, 295 U.S. 193, 208 (1935).

Beyond its unintended, absurd and highly undesirable policy consequences, the United States' view that, once invoked by the President, the authorities contained in Section 1503's second proviso exist in perpetuity cannot be reconciled with its far more sensible view regarding the temporal scope of the authorities contained in that section's fourth and fifth provisos. Like Section 1503's second proviso, these provisos make certain provisions of law inapplicable with regard to Iraq.[5] In its *amicus* brief, the United States admits (at 20) that it was necessary for Congress to include a provision in the ESAADRIA extending the authorities referenced in Section's 1503's fourth and fifth provisos in order that they "would remain inapplicable [to Iraq] 'through fiscal year 2005.'" The United States argues (at 20), however, that this extension was not needed to ensure that the provisions of law that the President ordered "inapplicable to Iraq" pursuant to his authority under Section 1503 remained "inapplicable" to that country, because, once exercised, that authority had "a permanent effect."

The distinction the United States draws between Section 1503's second proviso and its fourth and fifth provisos finds absolutely no support in the statutory language. All three provisos are "authorities" that make certain provisions of law inapplicable to Iraq.

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[5] By its terms, the fourth proviso provides that "section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq." Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579. Similarly, the fifth proviso states that "provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds . . . in international financial institutions for Iraq shall not be construed as applying to Iraq." *Id.*

The sole difference between them is that the second proviso requires presidential action to bring about this result, while the fourth and fifth ones are self-executing. It is, of course, a basic rule of statutory construction that "'identical words used in different parts of the same act"—to say nothing of words used in the same section—"are intended to have the same meaning.'" *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enkilda Bank*, 293 U.S. 84, 87 (1934)). Thus, if as the United States admits, the authorities contained in the fourth and fifth provisos of Section 1503 do not outlast the sunset provision, then the same must be true of the authorities contained in that section's second proviso.[6]

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[6] The United States seeks to defeat this logic by pointing to a sentence from the Joint Explanatory Statement attached to the Conference Report to the ESAADRIA, which describes Presidential Determination 2002-23 as having "ma[d]e *permanently* inapplicable to Iraq any provisions of law that apply to countries that support terrorism." H.R. Conf. Rep. No. 337, 108th Cong., 1st Sess. 59 (2003) (emphasis added). This legal opinion, which somehow found its way into a committee report to a subsequently enacted statute, is hardly an authoritative interpretation of the meaning of the EWSAA. When Congress passed that statute in April 2003, it voted only for its bare legislative text, which, as set forth above, contains no linguistic basis for finding a temporal distinction between Section 1503's second proviso and its fourth and fifth ones. In such circumstances, adding an omitted word—"permanently"—into Section 1503 of the EWSAA because of a single isolated comment in the legislative history to an amendment that was enacted six months later would be entirely inappropriate. *See, e.g., Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 699, n.3 (2003) (noting that "a stray comment in a congressional report stands a long way from" (and "cannot make up for the absence of") "express statutory language"); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 , 550 (1982) (Powell,

The United States points out (at 20) that if the second proviso is not read to have permanent effect, then neither can Section 1503's principal clause, which gives the President the authority to "suspend the application of any provision of the Iraq Sanctions Act of 1990," Pub. L. No. 101-513, 104 Stat. 1979, 2047 (the "ISA")—something that the United States regards as implausible since "Congress never repealed the ISA" and the Commerce Department "continues to permit export to Iraq of items that would not be permitted" if the ISA were still effective. The United States' argument cannot be squared with Section 1503's use of the word "suspend"—the plain meaning of which is "to stop *temporarily*." Webster's New Twentieth Century Dictionary (2nd ed. 1966) (emphasis added). Leaving that inconvenient fact aside, the United States' argument also ignores the fact that, by its terms, the ISA gives the President the authority to terminate the trade embargo against Iraq, 101 P.L. 513, §§ 586C(c), and to waive any or all of the other sanctions specified in that act upon his determination that the conditions giving rise to their imposition no longer exist. *Id.* §§ 586H. To the extent, however, that one or more of those sanctions were not waivable, the fact that Congress may have neglected to act by repealing the ISA is hardly evidence of its intent to delegate to the President the authority to repeal that statute himself when it passed the EWSAA in April 2003.

J., dissenting) ("when critical words . . . are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate").

B. Even If Congressional Intent Regarding Application Of The Sunset Provision Were Unclear, That Provision Must Be Construed As Applying To The Authorities Contained In Section 1503 In Order To Avoid Grave Constitutional Questions In Regard To The Separation Of Powers.

The United States' attempt to construe the EWSAA as a delegation of congressional authority to, in effect, repeal the ISA—and, by necessary extension to amend Section 1605(a)(7) of the FSIA—cannot stand. As this Court acknowledged when it invalidated the Line Item Veto Act in *Clinton v. New York*, 524 U.S. 417 (1998), "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id.* at 438. "Instead, this legislative power is vested exclusively in Congress, and the exercise of such legislative power must follow the procedures set forth in the Constitution" and its Presentment Clause. *Terran v. Secretary of Health and Human Services*, 195 F.3d 1302, 1312 (Fed. Cir. 1999); *see also Clinton*, 524 U.S. at 448-49; *INS v. Chadha*, 462 U.S. 919, 954 1983("Repeal of statutes, no less than enactment, must conform with Art. I" of the Constitution.); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 14 (1st Cir. 2005) ("to permit an agency by its actions to repeal an act of Congress . . . would pose grave constitutional questions of violation of separation of powers").

In his concurring opinion in *Acree*, Chief Justice Roberts rejected the argument that Section 1503 is an unconstitutional delegation of legislative power—

reasoning that the authorities it confers upon the President are "akin to waivers that the President is routinely empowered to make in other areas." 370 F.3d at 64 n.3. In making this analogy, Chief Justice Roberts was, as set forth above, acting on the assumption that presidential authority to exempt Iraq from provisions of law applicable to terrorist countries would lapse with the passing of the sunset provision. If, however, that authority is regarded as lasting in perpetuity, the analogy to a presidential waiver breaks down.

As this Court has repeatedly held, if Congress wishes to delegate its authority to the President or some other executive official in a manner that passes constitutional muster, it "must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). By its express terms, Section 1503 does not establish any such "intelligible principle" to which the President's actions were required to conform. However, as his formal message to Congress explaining the rationale for his determination exempting Iraq from terrorism laws makes clear, implicit in the delegation of authority contained in Section 1503 was the requirement that the President determine any such exemption to be in the interest of the national security of the United States.[7]

[7] *Message to the Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 647, 647-648 (May 26, 2003) (noting that pursuit of terrorism lawsuits against Iraq

Indeed, no other interpretation of Section 1503 is possible, for if that section were construed as allowing the President to waive the application of statutory provisions without limit, it would clearly constitute an unconstitutional delegation of legislative power.

Inasmuch as the President's authority to exempt Iraq from provisions of law applicable to terrorist states is cabined by the requirement that he determine (in his admittedly unreviewable discretion) such exemption to be in the interest of national security, it must be the case that he can keep that waiver in place only so long as that remains his determination. If, for example, prior to the expiration of the sunset provision, the President had determined that the exemption he had granted Iraq was no longer consistent with U.S. national security interests, he would have been obliged to lift that exemption. Thus, by its nature, the authority contained in Section 1503's second proviso is temporary in nature.

Under the United States' interpretation of the EWSAA, however, Congress delegated to the President the authority to keep Iraq's exemption from provisions of law otherwise applicable to terrorist states in place, even if he determines that such exemption is *contrary* to the national security interest. Indeed, under the United States' interpretation, once the sun set on Section 1503's authorities, the President would be *unable* to lift Iraq's exemption, despite his view that it was

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threatens "the national security and foreign policy of the United States").

undermining U.S. security interests. In other words, because all of the authorities that Section 1503 gave the President would have expired with the sunset, the only way to make provisions of law applicable to terrorist countries re-applicable to Iraq would be for Congress to enact new legislation withdrawing Iraq's exemption.[8] Accordingly, under the United States' interpretation, the delegation of authority contained in Section 1503 was tantamount to an authority to rewrite every law applicable to countries that have supported terrorism to say "except Iraq."

It is a cardinal principle of statutory construction that where a proffered construction of a statute "raise[s] serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also United States v. Jin Fuey Moy*, 241 U.S. 394,

[8] Any authority the President might have to undo Iraq's exemption would have to be implied by statute or be inherent to his office. Since the passing of Section 1503's sunset date, there is no basis for finding any such authority implied under the EWSAA. And, to the extent the President's inherent powers over foreign affairs might give him the authority to make provisions of law applicable to terrorist states re-applicable to Iraq—a dubious proposition—he plainly has no inherent power to define the jurisdiction of U.S. courts and, hence, to make Section 1605(a)(7) of the FSIA re-applicable to Iraq. *See, e.g.*, *Palmore v. United States*, 411 U.S. 389, 40 (1973); *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Electronic Data Sys. Corp. v. Social Security Org. of Iran*, 508 F. Supp. 1350 (N.D. Tex.), *aff'd in part and vacated in part*, 651 F.2d 1007 (5th Cir. 1981).

401 (Holmes, J.) ("[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score"). Construing the authority Section 1503 gives the President to exempt Iraq from our terrorism laws as being contingent on his determination that such exemption is in our national security interest and as lasting no longer than the date set forth in that section's sunset provision is not "plainly contrary to the intent of Congress." In fact, it is precisely what Congress intended and, hence, it is the interpretation that must prevail in this case.

II. Absent An Unmistakably Clear Statement Of Congressional Intent—Of Which There Is None—Section 1503 Of The EWSAA Cannot Be Construed As Impliedly Amending Section 1605(a)(7) Of The FSIA.

For the reasons set forth above and in Respondents' brief, when read in its context and in light of the statutory purpose, Section 1503's second proviso was clearly intended to give the President the authority to temporarily exempt Iraq from laws, which, like Section 620A of the Foreign Assistance Act, restrict aid to and commerce with terrorist countries. At a minimum, however, even if Section 1503 could plausibly be construed as applying to Section 1605(a)(7) of the FSIA, that construction is, as Chief Justice Roberts himself acknowledged in his concurrence in *Acree*, neither unequivocally clear from, nor unavoidably required by, the statutory text. 370 F.3d at 62 ("I agree with the majority that this question of statutory interpretation is close, and I do not suggest that the EWSAA is entirely

unambiguous."). That admission dictates the result here because a clear and unmistakable expression of congressional intent is required in order for Section 1503 of the EWSAA to be construed as amending the jurisdictional grant contained in Section 1605(a)(7) of the FSIA.

It is a venerable rule of statutory construction—overlooked by both the majority and the concurring opinions in *Acree*— that "repeals by implication are not favored." *National Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007); *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939). This doctrine "applies with even greater force when," as here, "the claimed repeal rests solely upon an Appropriations Act." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978).

Before joining this Court, Justice Scalia explained that a "steady adherence" to the presumption against implied repeal:

> is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will

> be held to suspend the effects of an earlier law that they favor or oppose.

United States v. Hansen, 772 F.2d 940, 944 (D.C. Cir. 1985); see also *Regional Rail*, 419 U.S. at 134. As "[e]very amendment of a statute effects a partial repeal," this rationale is no less applicable to implied amendments than it is to implied repeals and, hence, this Court has "repeatedly recognized that implied amendments are no more favored than implied repeals." *Homebuilders*, 127 S. Ct. at 2533 n. 8; *see also Regional Rail*, 419 U.S. 102, 134 (1974); *United States v. Welden*, 377 U.S. 95, 103 n. 12 (1964).

Consistent with this principle, a legislative intention to repeal or amend a prior statute will be found only were such intention is "clear and manifest." *Homebuilders*, 127 S. Ct. at 2532 (2007); *see also Watt v. Alaska*, 451 U.S. 259, 267 (1981)); *Borden*, 308 U.S. at 199. Thus, this Court "will not infer a statutory repeal 'unless the later statute expressly contradict[s] the original act' or unless such a construction 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'" *Homebuilders*, 127 S. Ct. at 2532 (quoting *Traynor v. Turnage,* 485 U.S. 535, 548 (1988)). In other words, absent express statutory language referencing the earlier statute, "'[a] new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.'" *Regional Rail*, 419 U.S. at 133; *see also Borden*, 308 U.S. at 199; *Hansen*, 772 F.2d at 994.

By its terms, Section 1503's second proviso expressly applies to a single provision of law—Section 620A of the Foreign Assistance Act. Accordingly, that proviso can be construed as amending Section 1605(a)(7) of the FSIA to create an exemption for Iraq only if the conflict between these two provisions is irreconcilable. Such "positive repugnancy" exists between the words in Section 1503's second proviso and the various provisions of law that restrict aid to and commerce with terrorist countries. If Section 1503 were construed as not reaching those provisions, the phrase "any other provision of law that applies to countries that have supported terrorism" would have absolutely "no meaning at all."

By contrast, none of the judges on the *Acree* panel—Chief Justice Roberts included—thought that the words "any other provision of law" in Section 1503 of the EWSAA express an unmistakably clear congressional command to amend the jurisdictional grant contained in Section 1605(a)(7) of the FSIA to create an exception for Iraq. Indeed, citing the time-honored presumption against implied repeals, this Court has found that the use of similar words did not constitute the kind of "unambiguous statutory directive" needed to effect a limitation on habeas jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299, 312 (2002) (holding that statutory language, which barred judicial review of final orders of deportation "notwithstanding any other provision of law," did "not speak[] with sufficient clarity to bar jurisdiction pursuant to the general habeas statute").[9]

[9] *See also Calcano-Martinez v. INS*, 232 F.3d 328, 338-39 (2d Cir. 2000) (holding that "notwithstanding any other provision

Likewise, in these cases, Section 1503's second proviso does not constitute the kind of unmistakable congressional command that would be necessary to limit jurisdiction under Section 1605(a)(7) of the FSIA. That proviso would have ample meaning if, consistent with the underlying statutory purpose, it were construed as giving the President authority to remove the aid and trade barriers to the rebuilding effort that were posed by Iraq's designation as a terrorist state. In other words, Section 1503 of the EWSAA and section 1605(a)(7) are "capable of coexistence" and, hence, it is the duty of this Court "to regard each as effective." *Regional Rail*, 419 U.S. at 133-34.

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of law" language in § 242(a)(2)(C) of the Immigration and Nationality Act was "not strong enough" to repeal habeas jurisdiction because it did "not explicitly mention the jurisdictional statute or the general type of jurisdiction by name"); *Sandoval v. Reno*, 166 F.3d 225, 232 (3d Cir. 1999) (stating that "courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute" and "that only a plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice").

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be affirmed and the cases remanded for further proceedings.

Respectfully submitted,

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Vine, et al. v. Republic of Iraq Plaintiffs-Hostages

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